STATE OF MISSOURI
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
THREE MEMBER DUE PROCESS PANEL

, by and through his parent and legal guardian, ,	)
Petitioner,	)
v.	)
LAFAYETTE COUNTY C-1 SCHOOL DISTRICT,	)
Respondent.	)

COVER SHEET OF PERSONALLY IDENTIFIABLE INFORMATION

Student's Name:
DOB:

Parent's Name:
Address:

Representative:	Stephen Walker 23245 Fairmount Blvd. Beachwood, OH 44122 (216) 360-9200
Local Education Agency:	Lafayette County C-1 School District 805 W. 31st Street Higginsville, MO 64037-1671 Virginia Annett, Director of Special Services
Representative:	Teri B. Goldman Mickes Tueth Keeney Cooper Mohan & Jackstadt, P.C. 425 S. Woods Mill Road, Suite 300 St. Louis, MO 63017 (636) 237-2600
Hearing Panel:	Janet Davis Baker, chairperson Benjamin Franklin Donna Dittrich
Hearing Dates:	March 28, 29, June 13, 14 and 15, 2001
Date of Decision:	October 11, 2001

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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

STATEMENT OF ISSUES AND PROCEDURAL HISTORY:

This matter comes before the three-member hearing panel convened by the Missouri Department of Elementary and Secondary Education ("MDESE") pursuant to Section 162.961 R.S.Mo., on the request for due process filed by (hereinafter "Parent" or "Petitioner") through counsel Stephen Walker, on behalf of his son (hereinafter "Student"), a student enrolled in the Lafayette County C-1 School District ("school district" or "district" or "Respondent"). The request was received by MDESE on February 5, 2001. A three member hearing panel was convened by MDESE consisting of panel members Donna Dittrich and Benjamin Franklin, and chairperson Janet Davis Baker. The specification of issues set out by Petitioner in his due process request (Respondent's list of witnesses and exhibits at exhibit no. 157, hereinafter "Ex. R-157") asserted that the school district failed to provide Student with a free appropriate public education ("FAPE") in the following summarized respects:

1. The school district failed to convene a meaningful individualized education program ("IEP") meeting;
2. The school district failed to consider and generate relevant assessment data;
3. The school district failed to consider the Petitioner's request that an IEP be created and refused to develop an IEP upon request when a year was about to pass from the date of the last IEP; and
4. The school district failed to provide the Petitioner legally sufficient notice including what options were considered and why they were rejected.

The relief requested by the Petitioner included findings by the hearing panel of the school district's violation of the Individuals with Disabilities Education Act ("IDEA") in the provision of FAPE, as well as an order requiring the development of an IEP by the school district and an identification of Petitioner as the prevailing party for purposes of seeking attorneys' fees in a subsequent court proceeding.

In subsequent correspondence dated March 22, 2001, the Petitioner further specified the issues raised by the due process request. The Petitioner's due process request only concerned actions taken by the school district subsequent to July 17, 2000. Petitioner further clarified that the school district allegedly did not consider assessments of Student done in April and July 2000 during the December 5, 2000 conference or the February 26, 2001 IEP meeting. Petitioner further states that the school district failed to generate the data suggested during the February 26, 2001 IEP meeting and refused to suggest appropriate assessments that could be done during the December 5, 2000 conference. Finally the Petitioner states that the school district failed to generate proper written notice relating to either the December 5, 2000 or February 26, 2001 meetings. As additional remedies, the Petitioner requested that the hearing panel order assessments that did not depend on Student's presence in a school environment to be performed by the school district in order to generate an appropriate IEP, order the development of an appropriate IEP and order compensatory education from at least September 8, 2000.

This is the fourth request for due process made by Petitioner concerning the education of his son by the Respondent school district. The first request was made on May 3, 2000, and a hearing was held on June 20-21, 2000, with a decision issued on July 19, 2000.[1] The issue before the hearing panel was in general the school district's alleged failure to provide FAPE through Student's high school years and whether he should be graduated. The first hearing panel determined that the school district provided FAPE to Student in all respects for all school years at issue and that he should have graduated with his class in May 2000. Ex. R-2 at p. 22. This hearing panel decision was appealed to the United States district court for the Western District of Missouri, where it is now pending. Ex. R-2 at p. 43. The second due process request was made on July 17, 2000 and was subsequently dismissed by the hearing panel without hearing after the chairperson made a determination that the issues raised were the same issues involved in the prior due process request or involved issues that could have been raised in the prior proceeding. Ex. R-3 at p. 84. This second due process request has also been appealed to the same federal court and is pending. Ex. R-3 at p. 88. The third due process request was made on November 17, 2000, and concerned the school district's alleged refusal to convene meaningful IEP meetings and consider and generate relevant assessment data. A hearing was scheduled for January 22, 2001, and at that time the Respondent objected to the introduction of any documentary evidence by the Petitioner that had not been provided pursuant to the IDEA's five (5) day disclosure rule.[2] Rather than proceed, the Petitioner was allowed to withdraw the third due process request. However, the hearing panel did make rulings on Respondent's request for summary judgment and entered an order granting partial summary judgment, Ex. R-26 at p. 147, which stated that any actions of the school district prior to July 19, 2000, the date of the first decision, would not be considered by the third panel, under the principals of *res judicata* and collateral estoppel.[3]

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1. Petitioner attempted to withdraw this due process request prior to the issuance of a decision by the hearing panel. The federal court appeal filed by Petitioner alleges that the hearing panel had no authority to issue a decision after the date of attempted withdrawal. In any event, the hearing panel issued a decision, the substance of which is also the subject of the federal court appeal.

2. IDEA implementing regulations, at 34 C.F.R. § 300.509(b).

3. The third panel also made a finding of fact in its order granting partial summary judgment of January 31, 2001, that: "The district has at all times subsequent to the July 19, 2000 three member panel decision mentioned above [the first panel's decision] offered student the "stay-put" placement provisions of the December 1999 IEF as and for educational services." However, this determination was not repeated in the conclusions of law and the panel did

Also prior to hearing, counsel for Petitioner, Stephen Walker, petitioned the panel for leave to appear before it *pro hac vice*. Respondent objected to this petition. The hearing panel granted Mr. Walker's application.[4]

Prior to the start of the due process hearing for this matter, the Respondent school district filed a motion for summary judgment to which the Petitioner replied. The crux of the school district's argument was there was nothing for this panel to hear because: one, the first hearing panel determined that FAPE was provided to Student by the December 1999 IEP; and two, as the first panel's decision was appealed to federal court, the December 1999 IEP placement became the "stay-put" placement and the school district was not required by the IDEA to do more than be willing to continue to implement the placement. An additional argument implicit in the school district's definition of the "stay-put" placement was that the decision of the first hearing panel on this matter was *res judicata* and that the subsequent panels were bound to accept the first panel's rulings on FAPE.

This panel determined that both the request for due process and the statements contained in Petitioner's own Memorandum of Law indicated that Petitioner was limiting his complaints to those arising after July 19, 2000, the date of the first hearing panel's decision. The panel found that there were contrary opinions expressed in Petitioner's and Respondent's affidavits in support of their respective positions and that this panel could not rule that Respondent was entitled to judgment as a matter of law. The hearing panel did request briefing and argument prior to the beginning of the hearing on the stay-put issue relative to any continuing IDEA obligations of the school district.

At the start of the hearing on March 28, 2001, the panel heard argument on the stay-put issue and determined that it would hear evidence on the allegations of the Petitioner as they related to any asserted obligations of the school district, which arose subsequent to July 19, 2001. The panel would not hear any evidence to contradict the December 1999 IEP regarding its provision of FAPE for the 1999-2000 school year as the first panel determined that issue and the matter was appealed to federal court. Because the December 1999 IEP contained the stay-put placement, the panel would hear evidence on whether the school district complied with this IEP after July 2000 and whether the school district had any other continuing obligations under the IDEA other than merely making the stay-put placement available.

The panel also heard argument on Petitioner's motion to recuse Respondent's attorney, Teri Goldman, from representing the school district in these proceedings. The panel determined that Ms. Goldman was acting as an advocate for her client in the IEP meetings she attended and was not a necessary witness to these meetings as others were present who could testify. Even if Ms. Goldman's testimony was determined to be necessary by the Petitioner, the Petitioner would not

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state that it would consider issues relative to the December 5, 2000 IEP meeting. Because the evidence of the District's supposed compliance was contained in a "Prehearing Conference Transcript" and was not apparently presented in the course of an evidentiary hearing, this panel will not be bound by this finding.

4. Respondent has now moved the hearing panel to recind this order in light of a recent decision from the Circuit Court of Cole County, Missouri, holding that the hearing panels do not have authority to rule on motions to appear *pro hac vice*. The hearing panel will not overrule its prior order. First, local counsel, Melissa Cilley, had entered her appearance in this case and this may not have been the situation in the Cole County case. Second, the issue of Mr. Walker's admission will probably be raised by Respondent in one of the federal appeals of prior due process hearings now pending, or quite possibly in this case, should a federal appeal be taken.

be allowed to derail the presentation of the school district's case by the objection and Ms. Goldman could testify if called by Petitioner.

A five day hearing was held in two stages, on March 28 and 29, 2001, and on June 13, 14 and 15, 2001, in the administrative offices of the Respondent school district. The hearing was open at Petitioner's request. Petitioner was represented by Stephen Walker and Respondent by Teri Goldman, and John Brink on March 28 and 29. The following exhibits were admitted into evidence by the panel: Respondent's exhibits 1-43 and Petitioner's exhibits 2-9 and 11-16. Petitioner's exhibits 1 and 10 were proffered, objected to by Respondent, and not admitted. Petitioner's exhibit 17, proffered at the conclusion of the hearing for rebuttal and objected to by Respondent, was not admitted at that time and the issue of admissibility was taken under advisement by the chairperson. The chairperson will not admit this exhibit as it was not produced to Respondent pursuant to the five day disclosure rule of 34 C.F.R. § 300.509(b) and it was foreseeable that Petitioner would have used this exhibit during his case in chief or for rebuttal purposes.

TIME-LINE INFORMATION:

The initial deadline for issuance of the hearing panel's decision was on March 22, 2001. The school district requested an extension, which was granted by the chairperson through April 28, 2001 to allow for a hearing in late March. Because the hearing could not be concluded in March, the school district requested an extension until July 16, 2001, after the reconvened hearing which was scheduled in June, which was granted by the chairperson. At the conclusion of the hearing in June, the parties jointly requested an extension of the hearing panel's decision to allow for the submission of briefs, through September 6, 2001, which was granted by the chairperson. Subsequently, Petitioner requested extensions of the hearing panel's decision through September 14, September 20, and October 11, 2001, all of which were granted by the chairperson. This decision timely issues.

FINDINGS OF FACT:

1. This matter involves the education of Student, and is before the three-member hearing panel empowered by the Missouri Department of Elementary and Secondary Education pursuant to 20 U.S.C. § 1415 and R.S.Mo. §162.961.

2. Student is a student with disabilities for purposes of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* The nature of Student's disability is traumatic brain injury ("TBI").

3. The panel finds that the placement contained in the December 1999 IEP (Ex. R-1), with a placement for Student of 50% special education and 50% regular education in the course of a school day, constitutes the "stay-put" placement for purposes of this hearing. The IEP also required the provision of speech therapy for 30 minutes twice weekly, physical therapy for 30 minutes twice weekly and occupational therapy for 20 minutes once weekly. Because this placement is contained in the December 1999 IEP, that IEP is sometimes referred to as the "stay-put IEP." The panel further finds that it is bound by the first due process panel's finding that, at the time it was written, the December 1999 IEP offered Student a free appropriate public education in the least restrictive environment and that Student was eligible to receive his high school diploma in May 2000.

4. The December 1999 IEP contains a projected date of review of May 19, 2000. Ex. R-1. At the time the IEP was prepared in December 1999, the IEP team anticipated that Student would graduate in May 2000. Hearing Transcript volume (hereinafter "Tr. I, II, III, IV or V":page no.) II: 165; III:338; IV:22. The stay-put IEP was written to extend until Student's graduation from high school, whenever that event might occur. Tr. II:165. Although IEPs generally are written for one year's duration, the projected date to review Student's IEP was less than a year because of the anticipated graduation. Tr. IV:107.

5. The Petitioner's first request for due process, made on May 3, 2000, Ex. R-2 at p. 18, operated to prevent Student's anticipated graduation from high school in May 2000 and the subsequent federal court appeal of that hearing panel's decision has continued the status of Student as a current high school student.

6. Prior to May 2000, the District offered to reevaluate Student as an aid to the Missouri State Department of Vocational Rehabilitation to assist Student with services to be provided by this department post-graduation. Tr. III:461-62, 465; IV:40-41, 106, 115. At that time, the District did not need new assessment data to continue to provide Student with a FAPE as he was scheduled to graduate in May of 2000. Tr. III:465. Parent refused this offer. Tr. IV:41, 116, 142-43.

7. Subsequent to May 2000, Student did not return to the District for educational services in either the summer or fall of 2000. Tr. II:161; IV:35.

8. On September 6, 2000, Virginia Annett, the District's Special Services Director, High School Principal Joseph Minter, Parent, Rand Hodgson, the Parent's advocate, and Marge Ritter, another advocate for Parent, participated in a brief informal meeting that was not intended to constitute an IEP meeting. Tr. III:357; IV:32, 43, 202; V:968-69. Parent specifically was informed that the meeting would not be a formal IEP meeting. Tr. III:357; V:969. At that meeting, the individuals present discussed the stay-put placement and Ms. Annett informed Parent that the District would implement Student's stay-put placement. Tr. III:358. During that meeting, Parent presented no information to indicate to District personnel that the stay-put placement should be modified by agreement. Tr. III:358. Moreover, at that meeting, Parent did not request any specific changes to the stay-put placement or the December 1999 IEP nor did he make any suggestions about a change in implementation of the placement. Tr. III:358; IV:43-44. Neither Parent nor Mr. Hodgson requested that Student be reevaluated. Tr. V:802. Parent expressed some general concerns about Student with respect to independent living and social skills, indicated that he wanted a different program and inquired as to the type of program the District would provide. Tr. III:358; IV:34-36, 44. Ms. Annett left the meeting with the impression that Parent wanted a different type of program for Student than the one being offered by the District. Tr. III:467. Parent did indicate that Student would not return to the District. Tr. V:969.

9. At the hearing, Ms. Annett and Mr. Hodgson testified that Parent did not mention a possible placement at the Blue Valley School District nor did he present any information regarding that district at the September 2000 meeting. Tr. II: 190; III:359; IV:33-34; V:874, 969-70.

10. Although Student did not return to the district for services in fall of 2000, Virginia Annett testified that the District had sufficient information regarding Student's current functioning to discuss his educational needs. Tr. I:106-07; II:208. At hearing, school district personnel testified that the December 1999 IEP continued to be appropriate for implementation for the 2000-01 school year. Tr. I:95-96. District personnel also testified that had Student returned for services in fall 2000, the teaching staff would have continued to implement the December 1999 goals and objectives at the point at which such implementation ceased in May 2000, and that the present level of performance, the goals and objectives and the accommodations and modifications contained therein, continued to be appropriate for Student and offered him the opportunity to receive meaningful educational benefit. Tr. I:123; III:334, 340-347, 444; IV:20. The panel finds credible the testimony of the district's witnesses in this regard and finds that there was an IEP in place for Student, the December 1999 IEP, at the beginning of the 2000-01 school year and that a new IEP was not required and that the implementation of the December 1999 IEP could have continued to offer meaningful educational benefit to Student.

11. Ms. Annett testified at hearing that, if Student returned to school that fall, she had given some thought to alternate locations for implementation of the stay-put placement. Tr. II:277-78; IV:28-29. Ms. Annett did not contemplate that Student would retake the same high school courses in which he previously was enrolled. Tr. II:278; IV:29-31. Rather, in her opinion, the district could continue to offer an alternative program that was suggested and offered to the Student and Petitioner as early as October 1999 and offered again in December 1999. Tr. II: 278. The district had proposed that Student attend Wentworth Community College for fifty percent of his day in the morning and receive special education and related services for fifty percent of his day in the afternoon at the District. Tr. II:236-37, 283; IV:28-30, 163; V:963-64. In Ms. Annett's opinion, such services were consistent with the stay-put placement called for in the December 1999 IEP. Tr. II: 284; V:980. Parent rejected the option both times. Tr. V:963-66. Although Student was eligible to graduate with his class in May 2000, the District was willing to withhold his diploma and let him continue to attend Wentworth and the District through January 2001. Tr. V:9964-65, 982. The offer was not contingent upon Student accepting graduation at any time. Tr. V:980, 982. Parent indicated to Ms. Annett that he was rejecting the option because he wanted Student to attend high school until age twenty-one. Tr. V:966-67.

12. Wentworth is a community college located in Lexington, Missouri, approximately twenty minutes from the District. Tr. IV:29-30, 234. At the time the offer to attend was extended to Student, the district offered other high school students the opportunity to take courses at Wentworth. Tr.IV:54. The district planned for Student to audit courses at Wentworth and to work on his socialization skills. Tr. II: 281-82; IV:29-30. The district was prepared to arrange for Student to participate in the Wentworth plan at any time in August 2000 or thereafter. Tr. IV:31. In fact, the plan was ready to be implemented during the last semester of Student's senior year (1999-2000). Tr. IV:31. Parent was aware of that offer for Student's final semester as a senior because the plan was offered to him as early as December 1999. Tr. II:278-80; IV:31, 47, 52. The Wentworth plan remained on the table for Parent and Student to consider at all times. Tr. IV:224. However, Parent continued to refuse that option. Tr. II:278. At hearing, Ms. Annett testified that, in her opinion, the Wentworth option remained appropriate for Student in September 2000 and could have been implemented pursuant to the December 1999 IEP in light of stay-put. Tr. II:280; V:979-80. More specifically, Ms. Annett testified that in her opinion, the

Wentworth plan was simply a change in the location of Student's services and not a change of placement. Tr. V:979-80.

13. By letter dated September 8, 2000, Parent corresponded with Virginia Annett regarding the meeting held on September 6, 2000. Ex. R-4. In that letter, Parent wrote that he believed that Student's "types of needs could be address [sic] at the Blue Valley School District in Kansas" and requested that Ms. Annett "arrange for Student to attend this school." Ex. R-4. However at the hearing, Parent testified that he did not want Student to attend Blue Valley at the time he wrote the letter. Tr. V: 913. At the time of writing the letter, Parent presented no information to Ms. Annett by which she could confirm that a Blue Valley School District existed, what the phone number or address of that district might be, or whether the district was a private or public district. Tr. IV:24. At hearing, High School Principal Joseph Mintner indicated that he believed that the Blue Valley District was approximately two hours from Higginsville. Tr. IV:234. Parent never raised the Blue Valley District at any other time, including at subsequent IEP meetings in December 2000 and February 2001 and never specifically requested, at a formal IEP meeting, that the District modify stay-put by changing Student's placement to the Blue Valley School District. Tr. III:359. Based on Ms. Annett's understanding of the IDEA's least restrictive environment requirement, however, she testified that she did not believe that a placement in another district would have been appropriate for Student after May 2000 and she believed that placement in the district continued to be appropriate for Student. Tr. IV:24-26. In the Fall of 2000, the District's position was that, because of the prior panel's findings and conclusions, the district was going to maintain Student's placement in the district pursuant to stay-put. Tr. IV:25. In Ms. Annett's opinion, a change to the Blue Valley district would have changed the stay-put placement, in part, because of the impact of travel time on Student's instructional program. Tr. II:284; IV:25.

14. By letter dated September 14, 2000, Ms. Annett responded to Parent's September 8 correspondence, and emphasized that the earlier meeting was not intended to be an IEP meeting. Ex. R-5; Tr. III:359. In addition, in that letter, Ms. Annett noted that the purpose of the meeting was for Parent to "provide the district with guidance as to where [he] would like the stay-put placement implemented." Ex. R-5; Tr. III:359-60. Parent responded to Ms. Annett's September 14 correspondence on or about October 9, 2000. Ex. R-6; Tr. III:360. With that letter, he enclosed a copy of the Missouri Department of Vocational Rehabilitation's assessment report that had been completed on or about August 21, 2000. Ex. R-6; Tr. III:360-61; IV:21. In that correspondence, Parent requested an IEP meeting to create a program that included the types of services identified by the Department of Vocational Rehabilitation.

15. At hearing, Ms. Annett testified that, in her opinion, the December 1999 IEP incorporated an educational program that was consistent with the Vocational Rehabilitation recommendations and the concerns noted by Vocational Rehabilitation were consistent with the District's past observations. Tr. II:203-06, 209-13; III:362-63; IV:22. Ms. Annett also testified that the Vocational Rehabilitation assessment was received and considered by staff with respect to Student's educational needs prior to a subsequent IEP meeting in December 2000. II:201-02; III:360-62; V:387. Ms. Annett testified, that the report did not provide the District with any information regarding Student that was not previously available. Tr. II:203, 207. The Panel finds that the District gave proper consideration to the Vocational Rehabilitation report.

16. By letter dated October 16, 2000, Ms. Annett responded to Parent's October 9 letter. Ex. R-7. In her response, Ms. Annett wrote that "the district has always been willing to

provide stay put services as enumerated in the December 21, 1999 IEP." Ex. R-7. In addition, Ms. Annett indicated that, because of the pending litigation, the District was unwilling to override stay-put and, if Parent wanted to hold an IEP meeting to discuss changes to Student's IEP, the District would require legal counsel to be present. Ex. R-7; Tr. III: 363. At hearing, Ms. Annett testified that the District was willing to make changes to Student's December 1999 IEP if Parent made such a request and if she and the team believed such changes to be appropriate. However, Parent never made any such requests. Tr. II:257, 286, 288; III:363, 386. Ms. Annett did not refuse Parent's request for an IEP meeting at that or any other time. Ex. R-7; Tr. III: 363. Ms. Annett always agreed to hold any IEP meeting requested by Parent in response to each of his requests if the District's legal counsel was present. Tr. III:482.

17. By letter dated October 26, 2000, Parent responded to Ms. Annett's October 16 letter and wrote, "I think we both agree that at this stage a program at the high school would not meet Student's needs" and stated that he believed that a new IEP should be created. Ex. R-8; Tr. III:364. Moreover, Parent indicated in his correspondence that he did not believe the presence of the district's legal counsel at the IEP meeting would serve any useful purpose. Ex. R-8. Although Ms. Annett agreed that a high school program was not the best option for Student because of the prior panel's decision that he should graduate, she testified at hearing that Student could have continued to receive educational benefit at the high school had he returned to that setting in the fall of 2000. Tr. III:364-65. Ms. Annett testified that she was surprised by Parent's assertion that Student should not remain at the high school because he initially filed for due process specifically to prevent graduation and to continue Student's high school program. Tr. III:365. Ms. Annett further testified that the District was unwilling to hold an IEP meeting without Parent in attendance because the District still remained unaware of what, if any, changes he wanted made to the IEP. Tr. III:365-66.

18. In response to Parent's October 26 correspondence, Ms. Annett wrote a return letter dated November 9, 2000. Ex. R-9. In that letter, she stated that the District had always been willing to provide services as enumerated in the December 1999 IEP. Tr. III:366. In addition, Ms. Annett indicated that the District was unwilling to hold an IEP meeting without legal counsel present because of the continuing litigation. Ex. R-9. She again requested that Parent advise her as to how he wished to proceed. Ex. R-9; Tr. III:366. Ms. Annett did not refuse Parent's request for an IEP meeting. Ex. R-9; Tr. III:366. She never received a response to that portion of her letter in which she requested that Parent let her know how he wished to proceed. Tr. III:366.

19. By notice dated November 20, 2000, the District provided Parent with a written notification of an IEP conference scheduled for December 5, 2000. Ex. R-13; Tr. III:367. That written notification indicated that the meeting was being held at parent request and the District had invited its legal counsel to be present. Ex. R-13. The District sent the written notification on the standard form that it was using at the time. Tr. III:367. Ms. Annett recalled no response to this notice by Parent as to whether he would attend the IEP meeting and consequently, the district sent a second written notification of IEP conference to Parent dated November 27, 2000 for a meeting scheduled on December 5, 2000. Ex. R-14; Tr. III:367-68. Ms. Annett did not believe that Parent responded to the second notification to indicate whether he would attend. Tr. III:368.

20. By letter dated and apparently delivered on November 27, 2000, Parent corresponded with Ms. Annett asking whether the notifications were for an IEP meeting. Ex. R-

15; Tr. III:368-69. By letter dated November 27, 2000, Ms. Annett replied and confirmed that the written notifications were for an IEP meeting and requested that Parent inform her whether he would attend. Ex. R-16; Tr. III:369. Ms. Annett doesn't recall any response by Parent to this letter. Tr. III:370. However, Ms. Annett believed that Missouri law allowed the District to conduct an IEP meeting without the parent in attendance upon sending of two notifications and she testified that the IEP meeting was going to be held even without the parent in attendance. Tr. III:370.

21. On or about December 5, 2000, Student's IEP team met. Ex. R-18; Tr. III:370. The following individuals were present and had the opportunity to participate in the meeting: Parent; Marjorie Ritter, friend of Parent; Rev. Wilbur Conway, friend of Parent; Joseph Mintner, the District's High School Principal; Janet Jones, the District's process coordinator; Janet Hamilton, special education teacher; Darryl Jeffries, high school regular education teacher; Virginia Annett, and Teri Goldman, the District's legal counsel. Ex. R-18. Student did not attend the meeting. Tr. IV:170. The panel finds that all necessary IEP participants were present. The district maintained a written conference summary, which contained a description of the discussion that occurred at the meeting. Ex. R-18; Tr. III: 484.

23. At the meeting, the district, through its representative Ms. Annett, offered the stay-put placement to Student as reflected in the December 1999 IEP. Ex. R-18; Tr. III:371. Ms. Annett noted that the December 1999 IEP was still current and valid for Student. Ex. R-18. Parent was provided with a copy of his procedural safeguards and Ms. Annett then requested that Parent state the purpose of the meeting pursuant to his request to meet. Ex. R-18. In response, Parent stated that he believed that the District would have prepared a new IEP. Ms. Annett then indicated that, because of stay-put, the December 1999 IEP still applied. Ex. R-18. Subsequently, the District passed out copies of the December 1999 IEP to the participants and Ms. Annett read the entire IEP. Ex. R-18; Tr. II:170, 210; III:370-71, 415; IV:109. After the IEP was read and reviewed, Ms. Annett asked if Parent had any requests concerning that IEP and he responded by stating that he thought the District would have a plan to offer. Ex. R-18. Parent offered no information to the team to suggest that the IEP's present level, goals and objectives, or accommodations and modifications were no longer appropriate and Parent requested no changes to the document. Tr. III:372. Although Parent indicated that he had new evaluations for the team to consider, he did not present any additional evaluations to the team. Ex. R-18. In response to the District's question regarding what Student had been doing since May 2000, Parent stated that Student was at home and not working. Tr. III:372, 430. The action recommended at the conclusion of the meeting was the district's continued implementation of the December 1999 IEP should Student return to school. Ex. R-18.

24. As of the December 2000 IEP meeting, the district believed that it had sufficient assessment data to determine whether the December 1999 IEP goals and objectives were still appropriate for Student. Tr. II: 228-30. Neither Parent nor his advocates suggested that they had any information, including the Vocational Rehabilitation assessment, to indicate that the IEP was not appropriate or that Student would not continue to benefit from implementing the December 1999 IEP's goals and objectives. Tr. III:347, 352-53. The first page of the December 1999 IEP was updated to reflect the December 5, 2000 meeting and states that a meeting occurred, that Parent did not request any changes to that IEP and that the IEP team's decision was to continue to offer to implement the IEP per stay-put. Ex. R-19; Tr. III:373. Because the team met in December 1999 and again in December 2000 to review Student's IEP, the Panel finds that the

District fulfilled its IDEA obligation to review the IEP on at least an annual basis and that there was no requirement to write a new IEP annually.

25. By letter dated January 31, 2001, the Respondent's attorney Stephen Walker corresponded with the district's legal counsel Teri Goldman. Ex. R-25. In that letter, Mr. Walker states that, by way of that correspondence, he was providing Parent's consent to a reevaluation to be conducted of Student by the district. In addition, Mr. Walker further stated his opinion that, Parent was not required to wait "until an IEP meeting is convened to give the school consent to run whatever assessments it deems appropriate." Ex. R-25 at 145; Tr. III:374.

26. By letter dated February 1, 2001, the District's legal counsel responded to Mr. Walker's January 31 correspondence. Ex. R-27. In that correspondence, Ms. Goldman stated that pursuant to the 1997 amendments to the IDEA, three year reevaluations were no longer required if the IEP team determined that no additional data was necessary. Ex. R-27. In addition, Ms. Goldman stated that, in her opinion, it was a violation of IDEA for the District to accept Mr. Walker's representation of Parent's consent in place of the informed written consent that must be obtained for reevaluation subsequent to the IEP team's determination of specific tests to be administered. Ex. R-27 at 153. Finally, Ms. Goldman informed Mr. Walker that the District would convene Student's IEP team to discuss and consider the Petitioner's request for a reevaluation. Ex. R-27 at 153. The panel finds that Mr. Walker's attempts to provide Parent's consent to a reevaluation does not satisfy the IDEA's requirements for informed written parental consent prior to a reevaluation.

27. By notice dated February 6, 2001, the District sent a written notification for an IEP conference to Parent for a meeting to be held on February 26, 2001. Ex. R-29; Tr. III:374.

28. On February 26, 2001, Student's IEP team convened to consider the Petitioner's request for a reevaluation. Ex. R-34; Tr. III:374-75, IV:109. The following individuals were present and had the opportunity to participate: Parent; Janet Hamilton, Student's special education teacher; Janet Jones, special education teacher; Darrell Jeffries, high school teacher; Reverend Conway, family support; Rand Hodgson, parent advocate; Valerie Converse, the District's speech-language pathologist; Virginia Annett, the District's special education director; Joseph Minter, high school principal; and Teri Goldman, the District's legal counsel. Ex. R-34. Student did not attend the meeting. Tr. III:375. The panel finds that all necessary IEP participants were present.

29. At the February meeting, the District requested an update of Student's status. Ex. R-34; Tr. III: 377. Parent stated that Student was at home where he was working on life skills and transition and had no job. Ex. R-34; Tr. III:377. The team also discussed Parent's legal counsel's request for a reevaluation. Ex. R-34; Tr. III:377; IV:173. Mr. Hodgson specifically requested that the District conduct a reevaluation and suggested some specific assessment tools that he believed might be appropriate. Ex. R-34; Tr. II:270; III:377, IV:17-18. In response, the District indicated that it had had no contact with Student since May 2000 since he had not returned to school and that some of the assessments suggested by Mr. Hodgson would require interaction with and observation of Student over a period of time. Ex. R-34; Tr. II:221-228; III:377-78. Ms. Annett testified that many of the requested assessments had already been administered by the district and that the results of some of the assessments would not be expected to change. Tr. III:400. Because the district believed it needed contact with Student to complete additional assessments, Virginia Annett, as the District's local educational agency

(LEA) representative, stated that the district personnel would need contact with Student before a decision to reevaluate could be made by the IEP team. Ex. R-34; Tr. II:250, 261-62; III:379-85; IV:38-39, 110; V:979. Mr. Hodgson agreed that certain types of assessments being suggested would require such interaction and contact. Ex. R-34; Tr. III:380, IV:110. The district was not requiring Student to reenroll as a prerequisite to conducting additional assessments. Tr. II:221. The district would have liked Student to attend for a school quarter for observation by staff. Tr. III:385.

30. As of May 2000, Student had completed all his academic studies necessary for a high school diploma. Tr. IV:39. In addition, the members of the IEP team were already aware that Student displayed deficits in math and, therefore, did not see a need to reevaluate in that area. Tr. IV:39. If the team had needed additional information, it would have been in the social/emotional/behavioral areas, the areas expressed as of greatest concern by Parent and Mr. Hodgson. IV:39. The type of testing required and available in those areas requires greater teacher contact and observation. Tr. IV:39; V:972-73.

31. Although Ms. Annett informed Parent at the meeting that the IEP team would reconsider the reevaluation request after such contact with Student, Ms Annett testified at hearing that she did not believe there was a need to reassess Student as of February 2001 because she believed the goals and objectives contained within the December 1999 IEP remained appropriate for Student. Tr. III:381.

32. At the conclusion of the February 2001 meeting, Mr. Hodgson indicated that he or Parent would let the district know whether Student would return to receive services at the district. Ex. R-34; Tr. III:381. However, neither Mr. Hodgson nor Parent ever followed up and the district was never informed regarding Student's possible return. Tr. III:381; V:853-54.

33. At the February 2001 meeting, no member of the team recommended changes to the December 1999 IEP. Ex. R-34. Neither Parent nor Mr. Hodgson requested any changes to the December 1999 IEP. Tr. III:384-85; IV:206. At the conclusion of the meeting, Mr. Hodgson indicated that he would provide to the district at a later date any modifications that he and Parent wanted made to the December 1999 IEP. No such requests for modification were made. Ex. R-34; Tr. IV:19; V:853-55.

34. At the February 26 meeting, Parent and Mr. Hodgson also presented the team with an outside evaluation of Student that was completed by William Stiers, Ph.D. on or about March 30, 2000. Ex. R-34 at 170; Tr. III:375-76; V:812-13. The report reflects that Dr. Stiers evaluated Student in at least the following areas: cognitive, sensory perception, anxiety, depression, and achievement. Ex. R-34. Neither Parent nor Mr. Hodgson suggested that there was anything contained within Dr. Stiers' report that would have necessitated changes to Student's IEP. Tr. IV:10, 13. Mr. Hodgson commented that the report was incomplete. Tr. IV:13. At hearing, Ms. Annett testified that the information contained in Dr. Stiers' March 30 report was no different from that contained in a previous Dr. Stiers' report that was received by the district prior to the date of the stay-put IEP. Tr. I:99-101. However, the team had an opportunity to review Dr. Stiers' report at the meeting and the report was discussed by the team at the meeting. Ex. R-34 at 187-88; Tr. III:376; IV:13-15. According to Virginia Annett's testimony at hearing, the consensus of the team with respect to Dr. Stiers' report was that it was incomplete and that the team was not able to derive any new or previously unavailable information from that report. Tr. III:339, 376, IV:17. Based on her observations of what

occurred at the IEP meeting, Ms. Annett testified that she believed that Mr. Hodgson agreed with that consensus. Tr. IV:17. The panel finds that the District gave proper consideration to Dr. Stiers' report.

35. At the conclusion of the February 26, 2001 meeting, the district issued a written notice of action refusing the Petitioner's request for a reevaluation. Ex. R-34 at 182; Tr. II:290-91; III:385. The basis for the district's refusal was that district staff had not had an opportunity to observe Student since May 2000, he was not currently enrolled in the district, and the stay-put provision applied. Ex. R-34 at 182; Tr. III:385. The panel finds that the notice complied with all IDEA requirements and further finds that the district's reasons for the refusal were legally sufficient.

36. Ms. Annett testified extensively at the due process hearing. At the time of hearing, Ms. Annett had served as the District's special services director for five years. Tr. III:302-03. In addition to a bachelor's degree, Ms. Annett has a master's degree in education. Tr. III:303. As part of her extensive examination, Ms. Annett testified that the District was not unwilling to change the stay-put IEP's goals and objectives had the Petitioner brought something to the IEP team to justify such changes. Tr. V:970. Ms. Annett testified that she would have considered changes to the stay-put IEP had specific assessments been brought to the school district or specific goals and objectives had been requested. She testified that: "I don't recall this district ever saying no." Tr. V:970. The panel finds that Ms. Annett was a credible witness and that Ms. Annett's testimony as well as the documentary evidence establishes that the District was willing to make changes to the stay-put IEP, but that Parent presented no evidence to merit such changes.

37. Janet Jones also testified at hearing. At the time of hearing, Ms. Jones was employed as the District's process coordinator and served as a half-time special education teacher. Tr. IV:59. Ms. Jones was selected as the District's new special services director for the 2001-02 school year, upon Ms. Annett's retirement. Tr. IV:59. Ms. Jones has a bachelor of science in degree in education and a master's degree in learning disabilities. She has coursework beyond the master's level. Tr. IV:98. In addition, Ms. Jones is certified by the State of Missouri to teach in the areas of learning disabilities, mentally retarded and behavior disorders. Tr. IV:98. Ms. Jones has 21 years of experience in education. Tr. IV:98.

38. During Student's four years of high school, Ms. Jones was his special education teacher for various classes, including a study skills class. Tr. IV:59-60. As of May 2000, Ms. Jones was familiar with Student's strengths and weaknesses. Tr. IV:61. In May 2000, Student's strengths were his verbal ability and his ability to express himself well. In addition, reading was a strength for Student. Tr. IV:65. Math was a difficult area for Student and he needed assistance in staying organized. Tr. IV:65. Ms. Jones testified that the stay-put IEP addressed these and the other needs that Student had with regard to his disability. Tr. IV:87. Based on her experience in education and her knowledge of Student, Ms. Jones did not believe that the stay-put IEP needed to be modified in any way to serve Student's needs during the 2001-02 school year. Tr. IV:87-89. The Panel finds Ms. Jones' testimony to be credible in these areas.

39. Janet Hamilton, a special education teacher in the District since 1981, also testified. Tr. IV:133. Ms. Hamilton has a bachelor's degree in special education, is certified to teach in the special education area of mentally handicapped and also in regular education for kindergarten through ninth grade. Tr. IV:169. Ms. Hamilton has 25 years of teaching

experience. Tr. IV:169. Ms. Hamilton provided special education services to Student for one and one-half years and served as the case manager for his IEP during the 1999-2000 school year. Tr. IV:134. Although Ms. Hamilton testified that Student mastered the goals and objectives in the stay-put IEP, she believed that it was appropriate to continue those same goals and objectives in the Fall of 2000. Tr. IV:148-49. She testified that Student would have continued to receive educational benefit from that IEP had he returned to the district in the fall of 2000 and that she could have implemented the stay-put goals and objectives in different ways at that time. Tr. IV:172, 175. The Panel finds Ms. Hamilton's testimony to be credible in these areas.

40. High School Principal Joseph Mintner testified during the hearing. Mr. Mintner has 32 years of experience in education. Tr. IV:198. He has a bachelor's degree and a master's degree in school administration. He also has a specialist's degree. Tr. IV:222. Mr. Mintner testified that the district was willing to make changes to the stay-put IEP if requested and appropriate. Tr. IV:224. Mr. Mintner also testified that he believed that Student would benefit best from implementation of the stay-put IEP at Wentworth Community College where Student could audit a variety of classes and work on his social skills. Tr. IV:227. The Panel finds Principal Mintner's testimony to be credible in these areas.

41. Parent's advocate, Rand Hodgson, also testified at hearing. Parent testified that he is a professional paid advocate for parents of children with disabilities. Tr. IV:244. Mr. Hodgson attended college for one and one-half years and has no degrees or certifications in education or special education. Tr. IV:242; V:792, 795. Mr. Hodgson stated at hearing that he had never observed Student in a school setting. Tr. V:801.

42. At hearing, Mr. Hodgson acknowledged that Student's strengths were in reading and oral advocacy and that he believed that the stay-put IEP listed those areas as strengths. Tr. V:795. Mr. Hodgson stated that his current concern with regard to Student's educational program was in the area of behavior. He acknowledged that the stay-put IEP contained a behavior management plan to address behavioral issues but that he did not believe this was adequate. Tr. V:809. Mr. Hodgson also agreed that it was not beneficial for Student to have not been involved in an educational process from May 2000 to the time of hearing. Tr. V:796-97.

43. Mr. Hodgson was questioned during the hearing about the Petitioner's request for a reevaluation in February 2001. Tr. V:817-830. He acknowledged that some of the school staff would have more knowledge of testing requirements than did he and his information about some of the suggested tests was based on his own experience, including the amount of personal contact desirable for some of the testing instruments. Tr. V:817-818. Mr. Hodgson testified that many of Student's educational needs were the same before and after May 2000. Tr. V:818-835. Mr. Hodgson stated that he did not remember all the goals and objectives of the stay-put IEP. Tr. V:845. Mr. Hodgson testified that the concerns he had at the time of this due process hearing remained the same as those he had when he testified at the June 2000 hearing. Tr. V:850-51. The panel finds that Mr. Hodgson's testimony with respect to Student's educational and evaluation needs is not persuasive.

44. Parent also testified at the hearing as a witness. Parent testified that, when he first filed for due process, he believed that there were other classes that Student could and should take in the high school setting. Tr. V:899-900. Parent did not think that Student should be away from the high school for as long a period as the school district was proposing without evaluations to see if Student could cope in the post-secondary environment. Tr. V:899-900. He testified that,

in his opinion, Student required a functional curriculum that he defined as "everything... that the school has to offer in the curriculum that a student can take... and use it to survive" or essentially the entire high school course of study leading to a diploma. Tr. V:908-09. Parent testified that the professional educators on Student's team were in a better position than he to determine what was educationally appropriate for Student but that the "parent's voice of concern" be included on the team as well. Tr. V:943-44. With regard to this testimony, the panel finds that Parent's testimony supports continued application of the December 1999 IEP during the stay-put period.

DISCUSSION AND DECISION RATIONALE:

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education in the least restrictive environment appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5); 1401(8). Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 188 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200-01.

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA's goals is the Individualized Education Program ("IEP"). 20 U.S.C. §§ § 1414(d), 1401(8).

An IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 200. Rather, under the *Rowley* standard, the ultimate question for a court under the IDEA is "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1st Cir. 1984). Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, "parental preference cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993).

A. Stay-put Placement and FAPE.

The IDEA provides that, while administrative or judicial proceedings are pending, "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement." 20 U.S.C. § 1415(j). The Missouri State Plan contains the same requirement: "during the pendency of any administrative or judicial proceeding . . . there will be no change in the assignment or status of a student with a disability unless such change has been made with the written consent of the parent or guardian." State Plan at 54. This is commonly known as the "stay-put" provision.

In the words of the U.S. Supreme Court, the stay-put mandate is "unequivocal" and demonstrated "that Congress very much meant to strip schools of the authority they had traditionally employed to exclude students, particularly emotionally disturbed students, from

school." *Honig,* 484 U.S. at 323 (1988). The Eighth Circuit, in *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), stated that stay-put is intended to preserve the status quo and to ensure uninterrupted continuity of education. Stay-put is for the benefit of parents, to prevent the removal of their children from the educational system while due process proceedings are underway. Parents have the option of honoring stay-put during appeals, but if they make a unilateral change, they bear the potential financial risk that the school district's program will be deemed appropriate and they will not be reimbursed for their choice of placement. *Burlington School Committee v. Department of Education*, 471 U.S. 359, 373-74 (1985).

"Educational placement" has been determined to mean the services a student receives, and not the physical location where services are provided. *Hill v. School Board of Pinellas County*, 954 F. Supp. 251, 253 (M.D. Fla. 1997)(no violation of stay-put if same IEP is implemented in different locations). Court cases on the issue have looked at the continuity of the program offered and the requirements of the IEP. The meaning of educational placement appears to fall "somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Board of Education of Community High School District No. 218 v. Illinois State Board of Education,* 103 F.3d 545, 548 (7th Cir. 1996); see also *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) (finding that a district did not violate stay-put where the IEP was not altered even though the location of the services was changed).

If the school district and the parents cannot agree on what constitutes the stay-put placement, a hearing officer or the courts have the authority to decide. *Letter to Wessels*, 16 EHLR 735 (OSEP 1990); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997). A hearing panel decision on placement constitutes agreement to that placement pending further appeals. *Murphy v. Arlington Central School District Board of Education*, 86 F.Supp.2d 354, 364 (S.D.N.Y. 2000).

In the case herein, the stay-put placement is the placement where Student was at the time of the first request for due process in May 2000, which was a high school student operating under an IEP developed in December 1999. The first hearing panel determined that FAPE was provided by this IEP and placement and it is the last IEP that Student had prior to instituting the series of due process appeals. It is also the last IEP that had the presumed agreement of Parent, as it retained Student in high school, which is the desire he expressed during the hearing, and in the record.

The question remains as to the extent of a school district's obligations under the stay-put provisions of the IDEA when the school district and the parent cannot be compelled to a change in placement for the child without mutual agreement. The Respondent school district has emphasized one district court case addressing this issue, *Kuszewski v. Chippewa Valley Schools*, 131 F. Supp.2d 926 (E.D. Mich. 2001). In this case, the district court held that a disabled student was not entitled to an annually updated IEP and reevaluations pending appeal of a state administrative decision in which the hearing officer concluded that the defendant school district provided the student a free appropriate public education to district court. The court stated:

> I find that the CVS [the district] was not required to update Brian's IEP during the "stay-put" injunction…. There is no reason that the CVS should have implemented updated IEPs during this litigation. It is clear from the history of this case that the parents would have objected to any new IEPs and would have caused additional levels of this dispute to develop. It would be futile to continue

> to add to this dispute by requiring new IEPs every year when the CVS was statutorily required to operate under the "stay-put" IEP.

Id. at 931.

The *Kuszewski* court, however, appeared to base its decision more on the speculation of the futility of the development of new IEPs and not any cited law. While the current due process appeal before this panel as with its predecessors seems destined for appeal, the panel is unwilling to rule as a matter of law that there is no continuing right to any entitlements or protections under the IDEA pending due process or court appeals. In fact, the federal district court for the Western District of Missouri, where the appeals are pending, appears to share this view when it denied Respondent's request for a stay of this hearing panel's proceedings, stating in its Order that: "There is no doubt that the stay put provision bestows certain rights on Student; that being the case, there is no justification for barring Plaintiffs [Petitioner] from vindicating whatever rights they have while Student is governed/protected by the stay put provisions." Case No. 00-0829-CV-W-3-ECF, *Order Denying Defendant's Motion for a Stay*, June 1, 2001. It is of course possible that through compliance with the IDEA's procedural requirements, the parties may learn of additional placement options and reach some mutual agreement regarding a change in placement.

Because this hearing panel considers itself bound by the first panel's decision on FAPE as provided by the December 1999 IEP, it is the role of this panel to first ascertain whether the school district provided FAPE by continuing to offer the placement in the stay-put IEP, and then to determine whether the school district met the procedural requirements of the IDEA, including the IEP requirements. The panel finds that the school district continued to offer the placement provided in the December 1999 IEP to Student but that Student never returned to school to take advantage of the services available through this placement. Student's father and advocate did suggest a placement in the Blue Valley School District at one point in time but provided no information about the services offered there and the school district did not have to agree to this as an alternate placement in consideration of the stay-put provisions of the IDEA. The evidence presented to the panel is clear that Parent would not be returning Student to the district for any services, which contradicts his desire initially to initiate due process so that Student would not graduate and would remain in the district.

Generally, the courts have required those parties who seek to change a placement to bear the burden of proof to support the change. *Cyress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Devine v. Indian River County School Board*, 249 F.3d 1289, 1292 (parents who are attacking a program they once deemed appropriate have the burden of proof to support the change); see also *Burger v. Murray County School District*, 612 F.Supp. 434, 437 (N.D. Ga. 1984) and cases cited therein. Certainly parties who have invoked the stay-put placement create a presumption that the placement should be continued so that the party seeking to change the placement bears the burden of proof. See *Honig*, 484 U.S. at 328. No evidence was presented to the panel that another placement for Student was justified by any change in Student's condition since he was last enrolled in the school district. No information was presented as to why an alternative placement, *i.e.*, Blue Valley in Kansas would have been appropriate for Student. As the school district believed that it was offering an appropriate placement for Student, again defined as one that would confer an educational benefit and not necessarily the "best" placement, there was no obligation on the part of the school district to investigate all other alternatives. This is no different than the situation where the parent desires a

private placement, perhaps a residential one, and the school district believes it offers an appropriate placement. *Burlington*, 471 U.S. 359; *Brougham*, 823 F.Supp. at 21. The burden is on the parent to support the change.

Petitioner cites to the case *Susquenita School District v. Raelee S.*, 96 F.3d 78 (3rd Cir. 1996) in support of the proposition that the stay-put provision cannot be used as a weapon by a school district to maintain a child in an inappropriate placement. *Susquenita* is distinguishable on its facts. It involved a situation where a school district wanted to maintain a child in a public school placement that *a hearing panel found inappropriate*. The stay-put placement of *Susquenita* was the private school placement ordered by the hearing panel, not a public school placement *that was determined to be appropriate by a hearing panel*. Our position on the obligations of a school district under stay-put does not conflict with this case.

B. IEP requirements.

The IDEA and Missouri law require an IEP to be in place at the start of each school year and to for a school district to conduct a review, at least annually, of the IEP. 34 C.F.R. §§ 300.342, 300.343. The IEP that was in place at the beginning of the 2000-01 school year was the stay-put IEP of December 1999. The Panel finds that the District complied with the IDEA's requirement to have an IEP in place at the beginning of the 2000-01 school year and to meet at least annually to review Student's IEP. There was an IEP meeting in December 2000 and February 2001. The school district has never refused Petitioner's request for an IEP meeting. There was no requirement imposed on Student to enroll in the school district as a prerequisite to developing an IEP and Petitioner's reliance on *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000) is misplaced. At these meetings, the school district offered the stay-put placement at either the high school location or a community college nearby. During these meetings, the IEP team determined that the December 1999 IEP continued to offer Student a FAPE in the least restrictive environment. The school district personnel were entitled to rely on the first due process panel's determination that the December 1999 IEP continued to offer Student FAPE, particularly in light of the fact that neither Parent nor his advocates presented the IEP team with any information or evidence to suggest that Student's needs had changed in any significant way after May 2000. Based on the information available to the team at the relevant times, the IEP team properly determined that the stay-put IEP remained appropriate. There is no showing that the Parent or his advocates were foreclosed from presenting any information or from stating their positions at the IEP meetings by district personnel or counsel. The fact that the school district desired counsel to attend the IEP meetings is understandable considering the litigation posture of this matter. Petitioner could have been similarly represented if he desired. There is nothing in the IDEA that precludes attendance of counsel at IEP meetings.

An IEP team must make its decision based on the information available to it at the time of the meeting. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)("measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date"). At the time the team convened in December 2000 and February 2001, it had information available to it that the December 1999 IEP offered Student a FAPE and included appropriate transition services, and that Student had fulfilled all necessary requirements for a high school diploma. In addition, the team had no information available to it at those subsequent meetings to suggest that Student's needs had changed. The panel finds credible Virginia Annett's testimony that neither the vocational rehabilitation assessment nor Dr. Stiers' report noted such changing needs and circumstances. The panel agrees that the

recommendations contained within the vocational rehabilitation report were consistent with and compatible with the IEP goals, objectives and accommodations contained within the December 1999 IEP. The panel notes that Dr. Stiers' report reflects testing that was completed prior to May 2000 and, therefore, could not have included information that Student had changed subsequent to May 2000. The panel finds that neither Parent nor his advocates requested any substantive changes to the December 1999 IEP nor provided any information to the IEP to merit any such change.

Parent also contended that the school district violated the IDEA by failing to have speech, occupational and/or physical therapists present during the meetings. There is no requirement that an IEP team include providers of related services if another team member is knowledgeable regarding the child's needs and resources in these areas. 34 C.F.R. § 300.344. Of course, there was nothing to preclude Parent from inviting these therapists to attend. Moreover, there is no showing of a change of Student's needs in these areas that would have changed the nature or amount of this type of service provided by the December 1999 IEP.

C. Reevaluation.

At hearing, Petitioner contended that the District violated the IDEA by failing and refusing to reevaluate Student after May 2000, even though the first due process panel determined that Student should have graduated in May 2000.

Pursuant to its implementing regulations, the IDEA provides that each child with a disability be reevaluated pursuant to 34 C.F.R. § 300.533 when conditions warrant a reevaluation but at least once every three years. 34 C.F.R.§ 300.536.

The reevaluations required under the IDEA do not require new data to be developed and new assessments to be performed unless the IEP team determines that it is necessary to determine present levels of performance and educational needs. When in February 2001, the Parent requested that the District reevaluate Student, the members of the team, under the authority of Section § 300.533, determined that no additional data was needed. However, the District informed Parent that if Student would return for a period of time such that his teachers and related service personnel could conduct the observations referenced above, the team could reconvene to determine if a reevaluation was in order. The Student was not required to re-enroll. Parent and his advocate asserted that there was testing that could be done of Student without his presence in the school environment. However, case authority supports a school district's right to conduct evaluations of its own choosing, especially in situations where the parent desires a placement out of the district. *See, e.g., Tucker v. Calloway County Board of Education*, 136 F. 23d 495 (6th Cir. 1998).

The panel finds that there is no requirement imposed on the school district by the IDEA that it only conducts such evaluations as the parent requests, and that the district has wide discretion in choosing evaluations that it believes will provide necessary information. It was not unreasonable for the district to request that Student be returned to a school environment for a period of time for observation to determine what, if any, additional testing might be needed to determine whether he could still receive educational benefit from the placement contained in the December 1999 IEP. Without parental cooperation in this regard, it is impossible for the school district to conduct evaluations that may lead it to come to mutual agreement with the parents regarding an

alternate placement pending appeals. The panel finds that the school district complied with its obligations in respect to reevaluation.

D. The Parents' Procedural Rights.

The Panel also concludes that the District did not impair the Petitioner's procedural rights in any way. Congress emphasized the importance of IDEA's procedural safeguards so that parents would be able to participate in the development of a student's IEP. *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996). However, well-established law acknowledges that minor technical procedural violations should not lead to a finding of a denial of FAPE. *Id.* As one court has noted, to hold that technical deviations from the IDEA's procedural requirements render an IEP invalid would "exalt form over substance." *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990). Thus, liability for an IDEA procedural violation may be found only if the violation compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the IEP process, or caused a deprivation of educational benefits. *Independent School District No. 283*, 88 F.3d at 562.

In this case, the panel concludes that no procedural violations occurred. Parent was provided with an IEP meeting whenever he requested. He was given every opportunity to participate in those meetings and to have advocates present and participating. The school district cannot be held liable when a parent, having requested a meeting, refuses to take advantage of the opportunity to more fully participate or to make requests of the IEP team, particularly where that parent has an experienced parent advocate involved. In addition, the school district provided Parent with written notices of the IEP meetings and of action refused when he requested a reevaluation. The panel rejects the Petitioners' contention that the school district refused to hold meaningful IEP meetings and finds that the school district did not refuse Parent's request for any IEP meeting, but informed him that it would invite legal counsel as a result of the pending litigation. The panel finds that the District was
entitled to have legal counsel present at its discretion. In sum, the panel holds that the undisputed evidence at hearing demonstrates that Student's parents were accorded all procedural safeguards, including the right to meaningful participation, at all times.

Arguably, the Student would not be harmed even in the event of procedural violations as Parent had stated that Student would not return to the District regardless of the location of offered services under any circumstances.

CONCLUSIONS OF LAW:

The hearing panel makes the following conclusions of law:

1. The Lafayette County C-1 School District was entitled to maintain Student in the placement stated in the December 1999 IEP, consistent with federal and state law "stay-put" requirements.

2. The Lafayette County C-1 School District continued and continues to make available the stay-put placement to Student subsequent to the decision of the first hearing panel on July 19, 2000.

3. The Lafayette County C-1 School District complied with the requirements of the IDEA regarding IEP meetings and IEP development.

4. The Lafayette County C-1 School District complied with the requirements of the IDEA regarding reevaluation of Student.

5. The Lafayette County C-1 School District complied with the procedural requirements of the IDEA.

DECISION:

The foregoing duly considered, the Panel finds in favor of the Lafayette County C-1 School District on all issues raised by the Petitioner's due process request.

APPEAL:

This decision is the final decision of the Missouri Department of Elementary and Secondary Education in this matter. Any person aggrieved by this decision has the right to appeal pursuant to the provisions of the federal IDEA and the Missouri Administrative Procedures Act. Federal law allows appeal within thirty (30) days after the mailing or delivery of this notice to you by filing an appropriate pleading with the U.S. District Court of proper venue. Alternatively, a petition may be filed in the Circuit Court of Cole County, Missouri, or in the county of the plaintiff or one of the plaintiff's residence, also within said thirty (30) day period.

Certification of Service:

A copy of the above and foregoing decision was sent by certified mail this 11th day of October, 2001, to counsel for the parties as well as sent by facsimile or electronic mail.

IT IS SO ORDERED this ____ day of October, 2001.

Respectfully submitted by:

_____
JANET DAVIS BAKER
Chairperson

_____
BENJAMIN FRANKLIN

_____
DONNA DITTRICH